No. 83-185

In the Supreme Court of the United States

OCTOBER TERM, 1983

SYLVIA COOPER, ET AL., PETITIONERS

v.

FEDERAL RESERVE BANK OF RICHMOND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a prior finding that an employer has not engaged in a pattern or practice of racial discrimination against the class to which petitioners belong precludes their assertion of individual claims that they were discriminated against because of their race.

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INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, prohibits, inter alia, racial discrimination in employment. The Equal Employment Opportunity Commission and the Attorney General are responsible for the enforcement of Title VII, 42 U.S.C. 2000e-5 and 2000e-6. Title VII is also enforced through private lawsuits, 42 U.S.C. 2000e-5, which provide an important complement to federal enforcement efforts. The federal government therefore has an interest in the development of the proper standards to govern private Title VII actions. In addition, since the government as an employer is subject to private suit under Title VII, 42 U.S.C.

(& Supp. V) 2000e-16, the decision in this case will affect the federal government as a Title VII defendant. The United States has participated in previous private Title VII class action cases for similar reasons. *E.g.*, *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1982); *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89 (1981).

STATEMENT

1. On March 22, 1977, the Equal Employment Opportunity Commission brought a civil action in the United States District Court for the Western District of North Carolina alleging that the Federal Reserve Bank of Richmond (the Bank) had violated Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a).[1] Specifically, the complaint alleged that the Bank had failed to promote black employees at its Charlotte, North Carolina, branch because of their race (II C. A. App. 1-3).[2] On Sep-

[1] Although Federal Reserve Banks perform important statutory functions, they are not governmental bodies for Title VII purposes, and their employees are not employees of the federal government. Upon the filing of an organization certificate with the Comptroller of the Currency, a federal reserve bank becomes a body corporate, with power to sue and be sued, and to appoint employees, define their duties, and dismiss them "at pleasure" (12 U.S.C. 341). Only the appointment of the president and first vice president requires the approval of the Board of Governors of the Federal Reserve System (*ibid.*). The Board of Directors of the bank, or its duly authorized officers or agents, is empowered to exercise "such incidental powers as shall be necessary to carry on the business of banking" (*ibid.*)—obviously including the establishment and implementation of personnel policies, including the ones challenged in this action.

[2] "II C. A. App." refers to the Appendix filed in the court of appeals in the Baxter case; "I C.A. App." refers to the Appendix filed in the court of appeals in the EEOC case.

tember 21, 1977, the district court permitted Sylvia Cooper, Constance Russell, Helen Moore and Elmore Hannah, Jr. (the Cooper petitioners) to intervene in the action. A class consisting of "[a]ll black persons who have been employed by the defendant at its Charlotte Branch Office at any time since January 3, 1974 * * *, who have been discriminated against in promotion, wages, job assignments and terms and conditions of employment because of their race" was conditionally certified pursuant to Rule 23(b)(2) and (3), Fed. R. Civ. P., on April 26, 1978 (Pet. App. 199a-200a (footnote omitted)). The district court ruled that the Cooper petitioners were appropriate representatives of the class; it directed the mailing of notice to identifiable class members, and its publication in the Charlotte newspaper (II C.A. App. 11-12). Phyllis Baxter and four other class members (the Baxter petitioners) received this notice (II C.A. App. 86), and did not seek to be excluded from the class, as the notice informed them they could be.[3]

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[3] The court order, to which all parties expressly consented, approved a notice that contained the following paragraphs (II C.A. App. 15):

> 4. If you fit in the definition of the class in paragraph 3 you are a class member. As a class member, you are entitled to pursue in this action any claim of racial discrimination in employment that you may have against the defendant. You need to do nothing further at this time to remain a member of the class. However, if you so desire, you may exclude yourself from the class by notifying the Clerk, United States District Court, as provided in paragraph 6 below.
>
> 5. If you decide to remain in this action, you should be advised that: the court will include you in the class in this action unless you request to be excluded from the class in writing; the judgment in this case, whether

2. An eight-day bench trial was held in September 1980, under the bifurcated procedure sanctioned in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 359-362 (1977).[4] At that time, the Baxter petitioners testified in support of the allegation of a pattern or practice of discrimination.[5] After considering post-trial submissions by both parties (Pet. App. 191a-192a), the district court issued a Memorandum of Decision holding "that defendant engaged in a pattern and practice of discrimination from 1974 through 1978 by failing to afford black employees opportunities for advancement and assignment equal to opportunities afforded white employees in pay grades 4 and 5. * * * Other than in the above

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favorable or unfavorable to the plaintiff and the plaintiff-intervenors, will include all members of the class; all class members will be bound by the judgment or other determination of this action; and if you do not request exclusion, you may appear at the hearings and trial of this action through the attorney of your choice.

6. If you desire to exclude yourself from this action, you will not be bound by any judgment or other determination in this action and you will not be able to depend on this action to toll any statutes of limitations on any individual claims that you may have against the defendant. You may exclude yourself from this action by notifying the Clerk in writing that you do not desire to participate in this action.

[4] Under that procedure, the stage I trial considers only the question of the employer's liability vel non. If liability is found, the claims of individual employees for specific relief are considered in stage II proceedings.

[5] At the bank's request, their testimony at trial was limited to the class issues (I C.A. App. 524-525). The district court ruled that it would not consider their testimony as presenting individual claims (*ibid.*).

particulars, however, there does not appear to be a pattern and practice of discrimination pervasive enough for the court to order relief" (Pet. App. 193a-194a). The district court also concluded that respondent Bank had discriminated against Cooper and Russell, but not against Moore and Hannah,[6] and stated further that "[a]lthough the court also has an opinion about the entitlement to relief of some of the class members who testified at trial, it will defer decision of those matters to a Stage II proceedings" (Pet. App. 194a).

The Baxter petitioners thereupon moved to intervene;[7] respondent Bank opposed that motion, noting that the Baxter petitioners "can pursue any individual claims they have in separate proceedings" (Response to Motion to Intervene 4 (quoted at Pet. 10)). In denying the motion to intervene, the district court stated that "[t]hose intervenors [sic] * * * in grade 5 or below are in the class as to which relief has been ordered by the judgment in this case and their rights will be dealt with in Stage II proceedings" (Pet. App. 286a-287a).[8] As to the other applicants

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[6] The district court found that respondent's refusal to promote Cooper to pay grade 8 and her subsequent discharge were discriminatory (Pet. App. 216a-223a) as was its failure to treat Russell similarly to others in pay grade 6 (Pet. App. 223a-229a). Moore complained of her treatment in pay grade 10 (Pet. App. 230a-232a); Hannah was denied promotion from pay grade 3 (Pet. App. 276a).

[7] One of the Baxter petitioners was denied promotion from pay grade 3, one from pay grade 6, two from pay grade 7, and one from pay grade 9 (II C.A. App. 72).

[8] In addition to the Baxter petitioners, Emma Ruffin sought to intervene alleging the bank had improperly refused to promote her from pay grade 4 (II C.A. App. 21-24).

for intervention, however, the district court concluded that the finding of no pattern or practice of discrimination in the group to which they belonged disqualified them from participation in the remedial stage of the litigation. The district court accordingly denied the motions to intervene "without prejudice to any underlying rights the intervenors may have" (Pet. App. 289a). It emphasized, however, that, because the Baxter petitioners were class members, the pendency of the suit tolled the applicable statutes of limitations on their individual claims, and "I see no reason why, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a Section 1981 suit next week" (Pet. App. 288a).

After denying the motions to intervene, the district court entered detailed findings of fact and conclusions of law. The factual findings included findings based on the testimony of the Baxter petitioners. Thus, the court found that Gilliam, who had sought a preferable job given to a white co-worker, Yates, "had more seniority than Yates and was equally qualified" (Pet. App. 248a); and that a white employee with "a lower performance rating and no greater qualification than Knott" had been promoted to be a supervisor over her, and the Bank had "offered no explanation" for this action (Pet. App. 251a-252a). See also Pet. App. 247a (Baxter findings), 253a (Harrison findings), 253a-254a (McCorkle findings). However, no conclusions of law concerning the individual Baxter petitioners were adopted, although there were such conclusions for all the Cooper plaintiffs, who had, of course, been granted intervention (Pet. App. 263a-283a).

Accepting the district court's suggestion, the Baxter petitioners thereupon filed a new complaint alleging

that each had been denied equal employment opportunities by respondent Bank in violation of 42 U.S.C. 1981 (II C.A. App. 71-73).[9] The complaint recited the specific facts upon which each individual complainant relied for the claim of disparate treatment (*id.* at 72), and did not allege any general pattern of discriminatory treatment. The complaint sought affirmative relief in obtaining the promotions withheld and back and front pay (*id.* at 73). The Bank moved to dismiss the new action on the ground that it was barred, as res judicata, by the prior class action (II C.A. App. 74-80). Although the district court denied the motion, stating its "inten[t] to decide the merits of the claims and appropriate relief, if any, for those claims" (Pet. App. 290a), it certified the question to the court of appeals for immediate review pursuant to 28 U.S.C. 1292 (Pet. App. 291a).[10]

3. The court of appeals reversed. It held that a class member who does not opt out of a class action is precluded by res judicata from "maintaining subsequently an individual action claiming discrimination in a particular ruled on in the class action" (Pet. App. 178a). The court held that the claims litigated in the class action included those asserted by the Baxter petitioners individually (Pet. App. 179a). Since the court of appeals found no "special circumstances" that would preclude the application of res judicata

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[9] The Baxter petitioners, who had not filed charges of discrimination with EEOC, did not seek to sue under Title VII.

[10] The interlocutory appeal of the *Baxter* case was consolidated with respondent Bank's appeal in the class action from the finding of a pattern or practice of racial discrimination in promotions from pay grades 4 and 5, and from the finding of discrimination against Russell and Cooper individually.

(*i.e.*, improper class certification, inadequate notice, or inadequate representation), it held the individual claims barred by the original class action (Pet. App. 177a-184a). Accordingly, it remanded the *Baxter* case to the district court with instructions to dismiss (Pet. App. 184a).[11] Rehearing en banc was denied by an equally divided court (Pet. App. 189a).

SUMMARY OF ARGUMENT

Analysis of this case must start with recognition that class claims and individual claims of employment discrimination are distinct, presenting different issues that may be proved by different evidence. Thus, to prevail in a class claim, the employees must show a pattern or practice of discrimination, while individual claims focus on the treatment of the specific employee on a specific occasion. In the original case here, the district court adjudicated the class-wide claim; it did not decide the individual claims of the Baxter petitioners.

Although the doctrine of res judicata forbids repetitious suits on the same cause of action, it does not preclude litigation between the parties to an earlier suit of related claims that were not, and could not have been, adjudicated in the original suit. The individual employment claims of the Baxter petitioners were not adjudicated in the class action, which determined only that there was no pattern of discrimination "pervasive enough" to warrant class-wide relief for the groups to which they belonged. Nor is it rea-

[11] The court of appeals also reversed the district court's judgment against respondent in the class action. Although the petition for a writ of certiorari presented two questions concerning that reversal, this Court granted certiorari only on the question involved in the *Baxter* appeal.

sonable to conclude that they could have been so litigated—the district court reasonably denied petitioners' motion to intervene; rather than turning the class action into a forum for adjudicating respondent's liability on the particular facts of a large number of discrete claims, the court properly referred the Baxter petitioners to separate suits on their individual claims.

This was an entirely appropriate exercise of the court's discretion in managing a class action. Rule 23 contemplates that the class action will be used to resolve issues common to the class while issues peculiar to each class member may be separately litigated. It is contrary to the purposes of Rule 23 to require each class member to intervene in the class suit in order to avoid forfeiting his right to litigate his individual claim. Nor is it reasonable to require the class member who knows he has been individually discriminated against to opt out of the class action in order to preserve his right to recover for that discrimination in the event the court ultimately determines that the class has not shown that the employer was more generally given to such practices.

An employer who prevails in a class action suit will reap substantial benefits from that victory in defending against any subsequent individual suits. The class member employees in those subsequent suits will be unable to use evidence tending to show any general discriminatory practices, and the employer can rely on the earlier judgment in his defense—for example to aid in rebutting a contention that his asserted business reason for the challenged adverse action was pretextual. Since the class action provides notice of the claims of all the class members, the employer is not prejudiced by lack of notice in the later individual suits.

In any event, on the particular facts of this case, it is clear that respondent urged, and the district court decided, that the Baxter petitioners could present their individual claims in a subsequent suit. After the district court denied petitioners' motion to intervene on that basis, the court of appeals should not have deprived the petitioners of all opportunity to litigate their individual claims.

ARGUMENT

I. RES JUDICATA DOES NOT BAR LITIGATION OF THE BAXTER PETITIONERS' CLAIMS

It is well established that the res judicata effect of a judgment in any action extends to issues that "were or could have been raised in that action." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948); 1B Moore, Lucas & Currier, *Moore's Federal Practice* ¶ 0.410[1], at 1154 (1981). In determining whether the doctrine bars a subsequent suit, courts have considered whether there is such identity of issues that a different judgment in the second action would destroy or impair rights established by the first judgment, and whether the same evidence would suffice to sustain both judgments. Moore, *supra*, at 1158; *Church of the New Song* v. *Establishment of Religion*, 620 F.2d 648, 652 (7th Cir. 1980); *Herendeen* v. *Champion International Corp.*, 525 F.2d 130, 133 (2d Cir. 1975); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 109 (5th Cir. 1975). It is, we submit, clear that individual claims of racial discrimination of the kind the Baxter petitioners apparently seek to litigate do not involve issues that were or could have been litigated in the EEOC class action.[12]

[12] The *Baxter* complaint by itself might be read as asserting no more than the claims common to the class (II C.A. App.

A. Any individual claims the Baxter petitioners may have were not actually determined in the EEOC class action. The finding that the Bank did not engage in a pattern of discrimination pervasive enough to grant relief did not eliminate the possibility that the Bank may have engaged in some acts of discrimination against individual class members. As the Third Circuit explained in refusing to apply the doctrine of res judicata in similar circumstances, a "finding of an absence of class-wide discrimination is not necessarily inconsistent with a claim that discrete, isolated instances of discrimination occurred." *Dickerson* v. *United States Steel Corp.*, 582 F.2d 827, 830-831 (1978).[13] See also *Croker* v. *Boeing Co.*, 662 F.2d 975, 997 (3d Cir. 1981), recognizing that individual claims survive the negative class finding by affirming

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72-73), but the district court's factual findings strongly suggest that at least some of the Baxter petitioners do have distinct individual claims (see page 6, *supra*). This is a matter to be considered by the district court in the course of the suit on the individual claims. If no such claims are asserted, that suit should be dismissed.

[13] Respondents (Br. in Opp. 4) and the court below (Pet. App. 183a) assert that the quoted language is dictum. Although it is true that the court there concluded that the district court had no power to adjudicate the individual claims of non-intervening witnesses after finding an absence of class discrimination, that conclusion rested in substantial part on the different nature of the individual and class claims—the same rationale that led the court to reject the employer's alternative res judicata argument. That rationale—and the court's emphasis on the potential unfairness to a defendant employer in permitting intervention after the trial court focused solely on the class issue (582 F.2d at 832)—strongly suggests that the *Dickerson* court assumed the class members could raise their individual claims in subsequent suits.

that class members may move to intervene to obtain an adjudication of their individual claims.[14]

Indeed, this Court has repeatedly held that an employer's showing that it has not engaged in discrimination against a group in the aggregate does not immunize it from claims that it has discriminated

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[14] Respondent's claim (Br. in Opp. 4) that the decision below "is consistent with other decisions involving this narrow issue," citing *Dalton* v. *Employment Sec. Comm'n*, 671 F.2d 835 (4th Cir. 1982), cert. denied, No. 82-129 (Oct. 4, 1982); *Woodson* v. *Fulton*, 614 F.2d 940 (4th Cir. 1980); *Kemp* v. *Birmingham News Co.*, 608 F.2d 1049 (5th Cir. 1979); *Fowler* v. *Birmingham News Co.*, 608 F.2d 1055 (5th Cir. 1979); *Jones* v. *Bell Helicopter Co.*, 614 F.2d 1389 (5th Cir. 1980); and *Dosier* v. *Miami Valley Broadcasting Corp.*, 656 F.2d 1295 (9th Cir. 1981). *Jones* held that when the EEOC sues on the charge of an individual and that suit is dismissed on the merits, the individual is precluded from bringing a repetitive private action on the identical charge (614 F.2d at 1390). The other cases all involve situations in which a pattern or practice of discrimination is conceded either in a consent decree or in a settlement that includes an award of relief to the class members, including those who subsequently attempt to file individual suits; the latter cases thus simply effectuate the salutary policy against double recovery. There is nothing inconsistent between any of these cases and the *Dickerson* analysis. The individual employment actions of an employer who has engaged in a pattern or practice of discrimination may reasonably be assumed to reflect that general discriminatory practice, so recovery on a pattern or practice claim properly bars a repetitive recovery by class members for individual claims. It does not follow that the *absence* of a sufficient showing of general discriminatory practice leads reasonably to the assumption that *no* individual employment decision was discriminatory. See, *e.g.*, *Eastland* v. *TVA*, 704 F.2d 613 (11th Cir. 1983) (although the district court correctly found evidence of pattern or practice of discrimination insufficient, evidence did establish that one "selecting supervisor" was racially biased, so two named plaintiffs recovered on individual claims).

against particular individuals in the group. For example, in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 579 (1978), the Court emphasized that "the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." Accordingly, the Court held that "a racially balanced work force cannot immunize an employer from liability for specific acts of discrimination" (*ibid.*). Similarly, in *Connecticut* v. *Teal*, 457 U.S. 440, 453-454 (1982), the Court reiterated that "[t]he principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as whole." The Court therefore rejected the argument that an employer could justify an employment practice having a disparate effect on black applicants by showing that its employment practices did not in the aggregate have a disparate effect on blacks. These decisions unequivocally show that an employer's nondiscriminatory treatment of a class as a whole does not relieve it of liability for individual instances of discrimination against members of that class. It follows here that the finding of an absence of class-wide discrimination in the EEOC class action did not determine the individual claims of the *Baxter* petitioners.[15]

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[15] This analysis relates primarily to individual and class claims of disparate treatment, such as the ones involved here (Pet. App. 9a-13a). In disparate impact cases, class and individual claims will generally coincide, because such claims attack a facially neutral policy, applied equally to all employees, on the grounds that the policy has a disproportionate effect on minority employees. See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 427 (1971). All class members would generally be affected by the policy in the same way and have the same claim. But cf. *Connecticut* v. *Teal*, *supra*.

B. Nor is there any basis for concluding that the Baxter petitioners' claims could have been litigated in the *Cooper* class action. The liability phase of a class action is generally restricted to claims of class-wide discrimination; it does not include an opportunity to litigate the discrete claims of nonparticipating class members. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 772-773 (1976); *Teamsters* v. *United States*, 431 U.S. at 360-361; *Dickerson* v. *United States Steel Corp.*, 582 F.2d at 831-832.

This limitation reflects the different character and methods of proof of the two types of claims. Individual claims focus on the treatment of a specific individual on a specific occasion. The basic question is whether that individual was denied an employment opportunity for a discriminatory reason. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 256-259 (1981). To prevail, an employee must initially demonstrate that he applied and was qualified for an available position. The employer must then explain the reason for its unfavorable action. The ultimate question for the trier of fact is whether the employer or its agent, in taking the particular employment action in question, was actually motivated by discrimination or by legitimate business reasons. *Id.* at 257. In a claim alleging a class-wide "pattern or practice" of discrimination, on the other hand, different standards of liability are applied and different proof is required. It is not sufficient for a plaintiff to demonstrate that an employer has engaged in sporadic acts of discrimination. Rather, plaintiffs must prove that discrimination is the company's "standard operating procedure—the regular rather than the unusual practice." *Teamsters* v. *United States*, 431 U.S. at 336. Proof of class-wide

discrimination generally depends very heavily on statistical evidence concerning the overall treatment of different groups. Although "anecdotal" evidence concerning the treatment of specific individuals is frequently presented as well, such evidence is offered to demonstrate that the employer has a class-wide practice of disfavoring minorities. Such testimony generally will not be a comprehensive or thorough presentation of the merits of the claims of each affected employee.

The district court's management of the *Cooper* class action reflected this difference in standards. The original EEOC complaint and the complaint in intervention of the Cooper petitioners alleged that the employer had engaged in a pattern or practice of discrimination against black employees with respect to assignment, promotion, wages and discipline. Statistical evidence on these practices was presented at trial. Although the Baxter class members were permitted to testify at trial, their testimony was accepted only to the extent that it was relevant to proof of the class action (I C.A. App. 524-525). The district court's decision was similarly limited to the merits of the class claim.[16] The court concluded that, except in pay grades 4 and 5, there was not a pattern of discrimination "pervasive" enough to justify class relief (Pet. App. 194a). This conclusion was based on findings that there was "no statistically significant difference" between the treatment of white and black employees except in pay grades 4 and 5 (Pet. App. 237a-238a). Although the court's factual findings strongly suggest that it believed at least some of the

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[16] It did decide the merits of the claims of the intervening petitioners (see pages 5-6, *supra*).

individual claims of the Baxter petitioners were meritorious (Pet. App. 248a-254a), it made no legal conclusions as to those claims. Finally, following its decision on class liability, the district court specifically refused to permit the Baxter plaintiffs to intervene for the purpose of litigating their individual claims, citing *Dickerson*.

In light of these rulings, the Baxter petitioners' individual claims could not have been litigated in the EEOC class action. The court of appeals therefore erred in applying the doctrine of res judicata to preclude the assertion of those claims in a separate suit.

II. FED. R. CIV. P. 23 DOES NOT BAR LITIGATION OF THE BAXTER PETITIONERS' CLAIMS

A. The court of appeals' decision also conflicts with the policies underlying Fed. R. Civ. P. 23. As this Court has explained, "[a] federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage unnecessary filing of repetitious papers and motions." *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 550 (1974); accord, *Crown, Cork & Seal Co.* v. *Parker*, No. 82-118 (June 13, 1983), slip. op. 5. Under the decision below, however, a class member who wants to benefit from class representation without losing the right to litigate his individual claim must file a protective motion to intervene in the class suit. The decision would thus promote "precisely the multiplicity of activity which Rule 23 was designed to avoid." *American Pipe*, 414 U.S. at 551. It would also pose a difficult dilemma for district courts attempting to keep class actions within manageable limits without sacrificing the rights of class members.

In any event, here the Baxter petitioners did attempt to file precisely such a motion. The Bank suggests (Br. in Op. 7-8) that their motion was untimely, but this Court has disfavored interpretations of Rule 23 that require class members to seek early intervention in order to protect their rights. *American Pipe*; *Crown, Cork & Seal*; *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 394 n.15 (1977); accord, *Robinson* v. *Union Carbide Corp.*, 544 F.2d 1258, 1261 (5th Cir. 1977). The Baxter petitioners sought intervention at the most logical point in the proceedings; if the district court had concluded that there was a pattern or practice of discrimination, there would have been no need for them to intervene to obtain an adjudication of their separate claims (cf. note 14, *supra*). Instead, they would simply have participated in the stage II proceedings in order to determine the relief, if any, to which each of them would be entitled (*Teamsters*, 431 U.S. at 361-362). Thus, it would be inefficient and contrary to the purposes of Rule 23 as explicated in *American Pipe* and *Crown, Cork & Seal* to require class members to intervene before the determination of the class claim in order to preserve their right to an adjudication of their individual claims.[17]

B. The court below (Pet. App. 173a-174a) and respondent Bank (Br. in Op. 7) also suggest that the

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[17] Moreover, as this Court emphasized in *Crown, Cork & Seal*, slip op. 5, "permission to intervene might be refused for reasons wholly unrelated to the merits of the claim", for example if the intervention would so complicate the issues to be resolved in the action as to make it unmanageable. Accordingly, even after a class has been certified, class members do not have a right to intervene to obtain an adjudication of their individual claims. *Dickerson* v. *United States Steel Corp.*, *supra*; *Croker* v. *Boeing Co.*, 662 F.2d at 997.

right of class members to obtain adjudications on their individual claims is fully protected by the "opt-out" provisions of Rule 23(c)(2).[18] They emphasize that the Baxter plaintiffs received notice and an opportunity to opt out of the class. By failing to opt out, the Bank argues, the Baxter plaintiffs agreed to be bound by the judgment in the class action. This argument misses the point. There is no dispute over whether the Baxter plaintiffs are bound by the judgment. But this simply means that they are precluded from litigating issues that were litigated in the class action.[19] Giving class members notice and an oppor-

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[18] This suggestion, of course, assumes that the suit is brought under Rule 23(b)(3), which permits a class member to opt out. Many Title VII suits are certified only under Rule 23(b)(2), where no such opportunity is available. Cf. *Gonzales* v. *Cassidy*, 474 F.2d 67, 74 n.12 (5th Cir. 1973). Class members in such suits could hardly be denied both the opportunity to opt out to preserve their claims and the opportunity to preserve their individual claims once a class suit has been filed. Here, the class was certified under both 23(b)(2) and (3), and the notice included the opt out provisions (II C.A. App. 11, 15).

[19] The court in *Dore* v. *Kleppe*, 522 F.2d 1369, 1374 (5th Cir. 1975) recognized that in determining whether a subsequent suit by a class member is barred by the prior class action because it raises the same cause of action, it is necessary to consider the special nature of class actions. Thus, it is inappropriate in this context to apply the principles of res judicata expansively to bar all claims that might have been litigated in the original action, thereby threatening the manageability of class actions by requiring class representatives to litigate numerous additional issues in order to preserve them. Accord, 18 Wright & Miller, *Federal Practice and Procedure* § 4455, at 474-475 (1981). Cf. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961); *Calagaz* v. *Calhoon*, 309 F.2d 248 (5th Cir. 1962) (judgment in class action to be given res judicata effect only when class members were adequately represented).

tunity to opt out cannot justify stripping them of their statutory right to litigate claims that are beyond the scope of the class action.[20] See, 18 Wright & Miller, *Federal Practice and Procedure* ¶ 4455, at 473-474 (1981).

The decision to opt out of a class action is not an easy one. The class member who receives notice of the filing of a pattern or practice suit can be expected to know the facts concerning his own employment history, upon which his individual claim would be based. He may not, however, have sufficient information to be able to make an informed judgment about whether his experience is typical, and thus whether the class claim is meritorious. If he determines not to participate in the class claim, he not only loses the substantial benefits of pooled resources,[21] he also loses the opportunity to participate in the stage II remedial proceedings in which he could rely on the *Teamsters* presumption (see 431 U.S. at 361-362).[22]

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[20] Indeed, the notice actually provided here can not reasonably be read to contemplate such a result. The notice specifically informed the class members that if they opted out they would "not be able to depend on this action to toll any statutes of limitations on any individual claims that you may have against the [Bank]" (II C.A. App. 15). This strongly implies that such individual claims survive for class members. A class member could hardly read this and believe that the failure to opt out, while tolling the statute of limitations, would waive the claim itself.

[21] Evidence of an employer's general discriminatory practices would be useful in establishing a prima facie case of individual discrimination or in contending that an asserted business justification was pretextual. An individual plaintiff would be unlikely to have the resources necessary to conduct discovery or to hire the experts necessary to present persuasive evidence of general discriminatory practices.

[22] It is not entirely clear to what extent a non-participating class member might be able, under principles of collateral

Rule 23 does not force a potential class member to make an election between litigating a class claim and a distinctly different individual claim. Rather, the right to opt out provided by Rule 23 is the right to opt out and present the same claim as that presented in the class action.[23] Where, as here, the claims are genuinely different, the failure to opt out of the class action does not bar the class member's subsequent assertion of the individual claim.

C. In sum, nothing in Rule 23 or the case law interpreting it indicates that an adjudication of class-wide issues against them should bar the distinctly different individual claims of class members. Although Rule 23(c)(3) states that judgments in class actions are binding on all class members, this can only logically refer to the common class question actually adjudicated in the action. This is precisely how Rule 23 has been interpreted. It has been recognized in various contexts that where a class action determines only the class-wide issue of whether the defendant maintained certain illegal policies or practices, that action, resulting in equitable relief, does not bar future suits seeking damages for specific deprivations of individual rights. *Bogard* v. *Cook*, 586 F.2d 399 (5th Cir. 1978), cert. denied, 444 U.S. 883 (1979); *Jones-Bey* v. *Caso*, 535 F.2d 1360 (2d

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estoppel, to rely on a finding in a prior class action that the employer had engaged in a pattern or practice of discrimination. Presumably, he would continue to bear the burden of persuasion in his individual suit.

[23] *Herbert* v. *Monsanto Co.*, 576 F.2d 77, 80, vacated on other grounds, 580 F.2d 178 (5th Cir. 1978); *In re Transocean Tender Offer Securities Litigation*, 427 F. Supp. 1211, 1217-1218 (N.D. Ill. 1977); 18 Wright & Miller, *Federal Practice and Procedure* § 4455, at 473 (1981).

Cir. 1976); *Marshall* v. *Kirkland*, 602 F.2d 1282 (8th Cir. 1979). Similarly, a district court's finding of no pattern or practice of discrimination should not bar plaintiffs' claims that they have been subjected to individual acts of discrimination.

III. PERMITTING THE BAXTER PETITIONERS TO PROCEED WITH THEIR INDIVIDUAL CLAIMS IS NOT UNFAIR TO THE BANK.

A. The Bank contends that permitting the Baxter petitioners' claims to go forward will deprive it of the benefit of its judgment and undermine the policies of Rule 23 (Br. in Op. 9-10). This contention is unpersuasive. Class actions will continue to be an efficient way of adjudicating numerous claims against an employer.[24] Where class-wide discrimination is found, the court will proceed to adjudicate the claims of entitlement to relief of the individual class members and a single suit will dispose of all claims against the employer. Where, as here, no class-wide discrimination is found, the class action will still have served as a final adjudication of the issue of whether the employer engaged in a pattern or practice of discrimination. The class members are bound by the class action (see, *e.g.*, *Hansberry* v. *Lee*, 311 U.S. 32, 42-43 (1940)), and thus will be barred by collateral

[24] Of course, resolution of the issues common to the class will not always fully determine the claims of all class members; additional proceedings on the individual issues may be necessary. See, *e.g.*, *Teamsters*; *Esplin* v. *Hirschi*, 402 F.2d 94, 100-101 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969). That does not mean that the class action has not served its intended purpose of "achiev[ing] economies of time, effort, and expense, and promot[ing] uniformity of decision as to persons similarly situated" (Fed. R. Civ. P. 23 advisory committee notes).

estoppel from contesting that finding in any future suit (*Dore* v. *Kleppe*, 522 F.2d 1369, 1374 (5th Cir. 1975)).[25] They will thus be precluded from using evidence tending to show such a pattern or practice to establish a prima facie case of individual discrimination, or to establish that the defendant's asserted reasons for its personnel decisions were pretextual. In contrast, the Bank can rely on the finding here in defending against the individual suits; the fact that it has *not* engaged in a pattern or practice of discrimination is relevant to, although not dispositive of, the claim that its actions in any particular case were discriminatory. *Furnco Construction Corp.* v. *Waters*, 438 U.S. at 580.

Class members will be limited to presenting the unique facts of their own individual situation. If such facts do not of themselves reasonably support a charge of discrimination, a pattern or practice decision favorable to the employer could be used to justify the award of counsel fees to it under *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978). This should serve to discourage the filing of insubstantial individual claims in the wake of an unsuccessful class suit, and to protect the employer if such claims are filed.

B. The Bank will not be prejudiced in defending the suit by the Baxter petitioners by any lack of adequate notice of their claims. The filing of the class action put the Bank on notice of the claims of all employees denied promotion since 1974. *Crown, Cork*

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[25] For this reason, respondent's claim (Br. in Op. 8-9) that the Baxter petitioners are asserting a right to the "one-way intervention" eliminated by the 1966 amendments to Rule 23 is without merit. Cf. *American Pipe & Construction Co.* v. *Utah*, 414 U.S. at 547-548.

and Seal v. *Parker*, slip op. 7-8. If there had been a finding of class-wide discrimination, stage II proceedings would have been conducted to determine the proper relief for individual class members (*Teamsters*, 431 U.S. at 361-362). The Bank would have had to establish the circumstances surrounding any individual class member's lack of promotion in attempting to prove that, even absent the pattern of discrimination, the individual still would not have been promoted (*id.* at 362). Thus, the filing of the class action put the Bank on notice of the need to preserve evidence concerning the employment history of all class members. That plaintiffs' individual claims will now be heard in a separate suit rather than during stage II proceedings certainly causes no prejudice to the Bank.[26]

IV. DISMISSAL WAS IMPROPER ON THE PARTICULAR FACTS OF THIS CASE

Even if this Court were to disagree with our primary submission and conclude that either the principles of res judicata or the interests underlying Rule 23 would ordinarily bar the assertion of individual claims of discriminatory treatment after a finding that no pattern or practice of such discrimination has been established, the court of appeals erred in directing the dismissal of the Baxter petitioners' suit on the particular facts of this case.

The Bank opposed intervention by the Baxter petitioners on the ground that they could file a separate

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[26] The fact that the district court resolved some issues in the class suit in the Bank's favor can make no difference here, in light of the Baxter petitioners' attempt to intervene and the district court's suggestion that they should instead pursue their individual claims in a separate suit. (See pages 5-6, *supra*).

action (page 5, *supra*); the district court agreed, and expressly so stated in its denial of intervention (Pet. App. 288a-289a), which was stated to be "without prejudice to any underlying rights" of petitioners (*id.* at 289a). Moreover, the district court's findings of fact make it clear that it did not intend, by its refusal to find a pattern or practice of racial discrimination except in pay grades 4 and 5, to foreclose the possibility of proving particular instances of discrimination against individual employees in other grades (Pet. App. 248a-254a).[27] And in certifying for interlocutory appeal the denial of the Bank's motion to dismiss, the district court again made clear that it had not intended, by its management of the class suit, to foreclose the bringing of individual claims not included within its finding of liability in the class action (Pet. App. 290a).

In these circumstances, the court of appeals clearly erred in dismissing the district court's explanation of the effect of its order denying intervention as "plain dictum" (Pet. App. 182a), and refusing to give effect to the stated limitations of that court's rulings. Instead, the court of appeals should have deferred to the district court's exercise of its discretion in managing the class action.[28] In any event, the principles

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[27] Indeed, the findings that petitioners Cooper and Russell, who had intervened, had been discriminated against in pay grades 7 and 6 are flatly inconsistent with any such conclusion (Pet. App. 216a-229a, 263a-274a). It is not entirely clear whether the courts below passed on the question whether there was a pattern or practice of discrimination in promotions out of pay grade 3, which petitioner Harrison occupied. This is a matter for decision in the *Baxter* action on remand.

[28] Fed. R. Civ. P. 23(d); *Croker* v. *Boeing*, 662 F.2d at 997; *In re Caesars Palace Securities Litigation*, 360 F. Supp. 366, 398-399 (S.D.N.Y. 1973).

of res judicata do not bar the maintenance of a second action in which the defendant has acquiesced. Restatement (Second) of Judgments § 26(1)(a) (1982). Nor do they preclude a court from limiting the scope of the action before it by reserving the plaintiff's right to bring a second action (*id.* § 26(1)(b)). Both of these exceptions apply here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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